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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 PAUL DENHAM, ) Civil No. 09-1505-JLS(WVG)  
12 )  
13 Plaintiff, ) REPORT AND RECOMMENDATION  
14 ) GRANTING DEFENDANTS' MOTION  
15 v. ) TO DISMISS  
16 )  
17 CORRECTIONAL OFFICER ARANDA, ) (Doc. # 16)  
18 et al., )  
19 Defendants. )  
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18 On July 10, 2009, Paul Denham (hereafter "Plaintiff"), an  
19 inmate proceeding *pro se* and *in forma pauperis*, filed a Complaint  
20 pursuant to 42 U.S.C. § 1983 (hereafter "Complaint") claiming that  
21 his civil rights were violated in August 2007, when he was housed at  
22 the Richard J. Donovan Correctional Facility (hereafter "RJD"). He  
23 sues all Defendants in their official and individual capacities, and  
24 seeks compensatory damages, punitive damages and reimbursement of  
25 the costs he incurred in pursuing this litigation. Defendants have  
26 filed a Motion to Dismiss the Complaint (hereafter "Motion").  
27 Plaintiff has filed an Opposition to the Motion. Defendants have  
28 filed a Reply to Defendants' Opposition. Plaintiff has filed a

1 Surreply. The Court, having reviewed the Complaint, Opposition,  
 2 Reply, Surreply, the exhibits attached thereto, and GOOD CAUSE  
 3 APPEARING, HEREBY RECOMMENDS that Defendants' Motion to Dismiss be  
 4 GRANTED.

5 I

6 FACTUAL ALLEGATIONS

7 Plaintiff sues the following Defendants: Correctional Officer  
 8 Aranda (hereafter "Aranda"); Nurse Benvin (hereafter "Benvin");  
 9 Captain Marrero (hereafter "Marrero"); E.A. Contreras (hereafter  
 10 "Contreras"); Silvia Garcia (hereafter "Garcia"); P. Cortez  
 11 (hereafter "Cortez"); Mr. Hernandez, Director of Corrections  
 12 (hereafter "Hernandez"); Matthew Cate, Secretary of the California  
 13 Department of Correction and Rehabilitation (hereafter "Cate")<sup>1/</sup>; and  
 14 Mr. K. Smith (hereafter "Smith").<sup>2/</sup>

15 Plaintiff is an inmate at Salinas Valley State Prison. He  
 16 alleges that while he was incarcerated at RJD, he worked at the  
 17 prison medical clinic where he became aware of misconduct of inmates  
 18 and staff. Specifically, Plaintiff alleges that inmate Barno  
 19 (hereafter "Barno") committed wrong doings while Barno was assigned  
 20 to work at the clinic. Plaintiff confidentially provided the  
 21 information regarding the misconduct to Correctional Officer Diaz.  
 22 (Complaint at 4).

23 On August 8, 2007, Plaintiff was questioned by a Correctional  
 24 Officer, (who Plaintiff identifies as "J. Doe," to protect his  
 25 identity, hereafter "Doe"). Doe told Plaintiff that he (Doe) feared

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27 <sup>1/</sup> Cate filed a Joinder to Defendants' Motion.

28 <sup>2/</sup> The Court notes that Defendants' Motion is not brought on behalf of Garcia, Aranda and Benvin, who have not been served in this action.

1 physical harm should Aranda<sup>3/</sup> discover his identity and that Aranda  
2 has the reputation for violence. Doe's identity was known to Sgt.  
3 Strickland (hereafter "Strickland") and Lt. Garza (hereafter  
4 "Garza"). Plaintiff described Barno's wrong doings to Doe and that  
5 Benvin was providing things to inmates that she was not supposed to  
6 provide. Plaintiff further alleged that Benvin could be a source of  
7 syringes for inmates, and that she was having an affair with Aranda.  
8 (Complaint at 4).

9 On August 12, 2007, Barno questioned and threatened Plain-  
10 tiff. Barno told Plaintiff that Benvin said Plaintiff provided  
11 confidential information to prison authorities to get Barno fired  
12 and, further that Benvin planned to retaliate against Plaintiff by  
13 falsely accusing Plaintiff of threatening her. Plaintiff denied  
14 that he was the confidential informant, and said that Benvin was  
15 trying to have him assaulted because she accused Plaintiff of being  
16 the confidential informant. Plaintiff told Barno to report the  
17 foregoing to the Office of Internal Affairs. (Complaint at 4).

18 On August 14, 2007, Plaintiff sent a written statement to Doe  
19 that described the information provided to him by Barno. On August  
20 15, 2007, Doe informed Plaintiff that he (Doe) had made copies of  
21 the written statement and forwarded the original statement to Sgt.  
22 Bravado in the Office of Internal Affairs. (Complaint at 5).

23 On September 4, 2007, Benvin informed the authorities at RJD  
24 that Plaintiff had threatened her. The threat was contained in two  
25 notes. (Complaint at 5).

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28 <sup>3/</sup> Plaintiff alleges that Aranda was having an affair with Benvin.  
Benvin worked at the prison medical clinic.

1           Thereafter, Strickland told Plaintiff that he was ordered to  
2 move to Administrative Segregation (hereafter "Ad Seg") because he  
3 was accused of threatening staff. Plaintiff told Strickland about  
4 his allegations regarding Barno and Benvin. Strickland, and later  
5 Garza, concluded that there was no reason to put Plaintiff in Ad  
6 Seg. They also concluded that the threatening notes to Benvin were  
7 attributed to another inmate. Also, Doe stated that Benvin had been  
8 starting false rumors about Plaintiff in an attempt to get Plaintiff  
9 fired from his job. (Complaint at 5).

10           Nevertheless, Marrero refused to rescind the order moving  
11 Plaintiff to Ad Seg, because he thought that Plaintiff was a  
12 possible threat to a staff member. However, on September 4, 2007,  
13 Plaintiff believes that there was a riot in Ad Seg, so he did not  
14 immediately go to Ad Seg.

15           On September 5, 2007, at about 12:30 AM, Aranda told  
16 Correctional Officers Cluck, Sandoval and Barnhardt (who apparently  
17 controlled the opening and closing of Plaintiff's cell door at that  
18 time), that he needed to see Plaintiff for official business, and  
19 ordered Barnhardt to open Plaintiff's cell door. Barnhardt did so.  
20 Aranda entered Plaintiff's cell, asked Plaintiff why he was talking  
21 about Aranda's personal business, grabbed Plaintiff's throat, and  
22 pinned Plaintiff down to the bed. Aranda demanded to know to whom  
23 Plaintiff had provided the confidential information. Plaintiff  
24 denied providing any information to anyone. Thereafter, Aranda  
25 released his grip on Plaintiff's throat and sat on a table in  
26 Plaintiff's cell. Then, Plaintiff ran out of his cell through the  
27 cell's partially open door and placed his hands on the wall in the  
28 "arrest position." Aranda exited the cell and told Plaintiff to

1 return to his cell. After Plaintiff returned to his cell, Aranda  
2 stepped inside the cell and punched Plaintiff on the left side of  
3 his jaw. Aranda ordered Plaintiff not to report the incident and  
4 threatened that he could return to Plaintiff's cell if Plaintiff did  
5 report the incident. Aranda ordered Plaintiff to stay away from the  
6 prison clinic. (Complaint at 6). Plaintiff believes that prison  
7 staff saw Aranda enter and exit his cell. Aranda denied to prison  
8 staff that he had been in Plaintiff's cell, and left the area  
9 without reporting the incident. (Complaint at 7). After Aranda  
10 left, Plaintiff was taken to the prison's Program Office, where he  
11 reported to Sgt. Dawson the incident involving Aranda. (Complaint at  
12 7).

13       Thereafter, Correctional Officer Diaz escorted Plaintiff to  
14 the medical clinic. At the clinic, Plaintiff gave a statement to  
15 Nurse Estoesia regarding the incident involving Aranda. Sgt. Diaz  
16 noted that Plaintiff had hand marks around his neck and swelling of  
17 the jaw. (Complaint at 7).

18       Plaintiff returned to the Program Office where he gave a  
19 video and written statement to Sgt. Dawson and Smith. (Complaint at  
20 7). While Plaintiff was waiting in the Program Office, and after  
21 Aranda discovered that Plaintiff had reported the incident involving  
22 Aranda, Aranda entered the Program Office and called Plaintiff "a  
23 fucking liar," and slammed his fist down on a counter near Plain-  
24 tiff. Plaintiff believes that on September 8, 2007, Aranda told  
25 Correctional Officers Sandoval, Cluck, Diaz and Barnhardt that he  
26 had entered Plaintiff's cell, "got angry," "lost it," and "put hands  
27 on (Plaintiff)." (Complaint at 7-8).

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1 Plaintiff believes that after Aranda made the statement to  
2 the Correctional Officers, Aranda was removed from the prison.  
3 Plaintiff also believes that Benvin was restricted from entering the  
4 facility in which Plaintiff was housed. (Complaint at 9).

5 On September 6, 2007, Plaintiff was placed in Ad Seg because  
6 it was alleged that he was a suspect in a threat against a staff  
7 member, and as a result, he was deemed a threat to the safety and  
8 security of the prison. On the same day, Marrero reviewed Plain-  
9 tiff's placement in Ad Seg and retained him there pending a decision  
10 of the Institutional Classification Committee (hereafter "ICC").  
11 (Complaint at 9).

12 On September 19, 2007, the ICC indicated that a "threat  
13 assessment" was underway, but added that Plaintiff would not be  
14 issued a Rules Violation Report. Thereafter, the ICC stated that  
15 the reason for Plaintiff's placement in Ad Seg was due to an ongoing  
16 inquiry about staff misconduct that Plaintiff had made. (Complaint  
17 at 9).

18 Plaintiff told the ICC that he wanted to be retained in San  
19 Diego because he was awaiting surgery and that his family could  
20 easily visit him in San Diego. (Complaint at 9-10). However, the  
21 ICC referred Plaintiff for transfer to another prison. Plaintiff  
22 appealed the referral. On October 11, 2007, an ICC representative  
23 rescinded Plaintiff's transfer because Plaintiff was awaiting  
24 surgery and because Plaintiff did not want the transfer. (Complaint  
25 at 10).

26 On November 15, 2007, at an ICC meeting, Marrero stated that  
27 the investigation into staff misconduct disallowed Plaintiff's  
28 return to the prison because he could endanger the safety and

1 security of the prison. Plaintiff alleges that there was no  
2 evidence to support this decision. (Complaint at 10).

3 Plaintiff informed the ICC that he wanted to stay in San  
4 Diego. But, Cortez recorded the ICC minutes to reflect that  
5 Plaintiff "wanted to transfer." Plaintiff believes that Cortez  
6 deliberately misreported the minutes to meet the ICC's requirements  
7 for Plaintiff's transfer. On December 1, 2007, Plaintiff was cleared  
8 to return to the general population of the prison. (Complaint at  
9 10). At some time thereafter, Plaintiff was transferred to another  
10 prison.

## 11 II

### 12 PLAINTIFF'S CLAIMS

13 Plaintiff claims the following:

14 (1) His Eighth Amendment right to be free from cruel and unusual  
15 punishment was violated when he was placed and retained in Ad Seg  
16 and transferred to another prison in retaliation for making  
17 complaints about prison staff;

18 (2) He was retaliated against for the exercise of his First  
19 Amendment right of freedom of speech - making complaints about  
20 prison staff;

21 (3) His right to due process was violated because he was unable to  
22 provide further information regarding his appeal that Benvin's  
23 conduct be investigated, Benvin attempted to put his life in danger  
24 by revealing to Barno that he was the confidential informant, Benvin  
25 retaliated against him by spreading false rumors about him, that  
26 Aranda's misconduct be investigated, that Plaintiff be provided  
27 copies of all reports generated with respect to the incident  
28

1 involving Aranda, and that Plaintiff be provided copies of all prior  
2 complaints against Aranda and Benvin.

3 Defendant's Motion asserts:

4 (1) Plaintiff's Complaint fails to state a claim for cruel and  
5 unusual punishment in violation of the Eighth Amendment against  
6 Hernandez, Contreras, Marrero, Cortez, Smith, and Cate.

7 (2) Plaintiff's Complaint fails to state a claim for deliberate  
8 indifference in violation of the Eighth Amendment against Hernandez,  
9 Contreras, Marrero, Cortez, Smith, and Cate.

10 (3) Plaintiff's Complaint fails to state a claim for retaliation for  
11 exercise of his First Amendment rights against Hernandez, Contreras,  
12 Marrero, Cortez, Smith, and Cate.

13 (4) Plaintiff's Complaint fails to state a claim for violation of  
14 due process; and,

15 (5) Hernandez, Contreras, Marrero, Cortez, Smith and Cate are  
16 entitled to qualified immunity.

17 III

18 STANDARD OF REVIEW

19 A motion to dismiss for failure to state a claim pursuant to  
20 FED. R. CIV. P. 12(b)(6) tests the legal sufficiency of the claims in  
21 the complaint. FED. R. CIV. P. 8(a)(2) requires only "a short and  
22 plain statement of the claim showing that the pleader is entitled to  
23 relief" in order to "give the defendant fair notice of what the ...  
24 claim is and the grounds upon which it rests." Bell Atlantic Corp.  
25 v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355  
26 U.S. 41, 47 (1957)); Erickson v. Pardus, 127 S.Ct. 2197, 2200  
27 (2007). Dismissal of a claim is appropriate only where the  
28 complaint lacks a cognizable theory. Bell Atlantic, 550 U.S. at



1 553-565. The court must accept as true all material allegations in  
 2 the complaint, as well as reasonable inferences to be drawn from  
 3 them, and must construe the complaint in the light most favorable to  
 4 the plaintiff. N.L. Industries, Inc. v. Kaplan, 792 F.2d 896, 898  
 5 (9th Cir. 1986); Parks School of Business, Inc. v. Symington, 51  
 6 F.3d 1480, 1484 (9th Cir. 1995). The court does not look at whether  
 7 the plaintiff will "ultimately prevail." Scheuer v. Rhodes, 94  
 8 S.Ct. 1683, 1686 (1974).

9 "If a complaint is accompanied by attached documents, the  
 10 court is not limited by the allegations contained in the complaint.  
 11 These documents are part of the complaint and may be considered in  
 12 determining whether the plaintiff can prove any set of facts in  
 13 support of the claim." Roth v. Garcia Marquez, 942 F.2d 617, 625 n.1  
 14 (1991) [quoting Durning v. First Boston Corp., 815 F.2d 1265, 1267  
 15 (9th Cir.1987)]. "[W]hen the allegations of the complaint are  
 16 refuted by an attached document, the Court need not accept the  
 17 allegations as being true." Roth, 942 F.2d 625 n.1 [citing Ott v.  
 18 Home Savings & Loan Ass'n, 265 F.2d 643, 646 n.1 (9th Cir.1958)].

19 "The focus of any Rule 12(b)(6) dismissal . . . is the  
 20 complaint." Schneider v. California Dep't of Corrections, 151 F.3d  
 21 1194, 1197 n.1 (9th Cir. 1998). Thus, when resolving a motion to  
 22 dismiss for failure to state a claim, the court may not generally  
 23 consider materials outside the pleadings. Id. This precludes  
 24 consideration of "new" allegations that may be raised in a plain-  
 25 tiff's opposition to a motion to dismiss brought pursuant to  
 26 FED.R.CIV.P. 12(b)(6). Id. (citing Harrell v. United States, 13 F.3d  
 27 232, 236 (7th Cir. 1993); 2 Moore's Federal Practice, § 12.34[2]  
 28 (Matthew Bender 3d ed.) ["The court may not . . . take into account

1 additional facts asserted in a memorandum opposing the motion to  
2 dismiss, because such memoranda do not constitute pleadings under  
3 Rule 7(a)."]].

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
5 show: (1) that the conduct complained of was committed by a person  
6 acting under color of state law; and, (2) that the conduct deprived  
7 the plaintiff of a constitutional right. Broam v. Bogan, 320 F.3d  
8 1023, 1028 (9<sup>th</sup> Cir. 2003); Balistreri v. Pacifica Police Dept., 901  
9 F.2d 696, 699 (9<sup>th</sup> Cir. 1988). Vicarious liability does not exist  
10 under § 1983. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1948 (2009); Jones  
11 v. Williams, 297 F.3d 930, 934 (9th Cir. 2002) (citations omitted).  
12 To hold a person "liable under section 1983 there must be a showing  
13 of personal participation in the alleged rights deprivation." Id.  
14 A supervisory official may be liable only if he or she was person-  
15 ally involved in the constitutional deprivation, or if there was a  
16 sufficient causal connection between the supervisor's wrongful  
17 conduct and the constitutional violation. See Redman v. County of  
18 San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991). Causation may be  
19 established only by showing that the supervisor set in motion a  
20 series of acts by others, which the supervisor knew or reasonably  
21 should have known would cause others to inflict the injury. Watkins  
22 v. City of Oakland, 145 F.3d 1087, 1093 (9th Cir. 1998).

23 Finally, where a plaintiff appears *in propria persona* in a  
24 civil rights case, the Court must also be careful to construe the  
25 pleadings liberally and afford plaintiff any benefit of the doubt.  
26 See Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th  
27 Cir. 1988); Bretz v. Kelman, 773 F.2d 1026, 1027, n.1 (9th Cir.  
28 1985) (en banc). The rule of liberal construction is "particularly

important in civil rights cases." Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992); Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987) ("Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel."). In giving liberal interpretation to a pro se civil rights complaint, however, a court may not "supply essential elements of the claim that were not initially pled." Ivey v. Bd. of Regents of the University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." Id.; see also Sherman v. Yakahi, 549 F.2d 1287, 1290 (9th Cir. 1977) ("Conclusory allegations, unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act."). Thus, at a minimum, even the pro se plaintiff "must allege with at least some degree of particularity overt acts which defendants engaged in that support [his] claim." Jones v. Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984).

#### IV

#### PLAINTIFF FAILS TO STATE A CLAIM OF CRUEL AND UNUSUAL PUNISHMENT AGAINST HERNANDEZ, CORTEZ, MARRERO, SMITH AND CATE

Petitioner claims that his Eighth Amendment right to be free from cruel and unusual punishment was violated when he was placed and retained in Ad Seg, and transferred to another prison. Defendants Hernandez, Cortez, Marrero, Smith and Cate argue that Plaintiff's Complaint does not allege a violation of the Eighth Amendment's ban on cruel and unusual punishment.

1           The Eighth Amendment standards for conditions in disciplinary  
2 housing are the same as those in the general prison population.  
3 Hoptowit v. Ray, 682 F.2d 1237, 1258 (9th Cir. 1982). To show  
4 Plaintiff's Eighth Amendment rights have been violated, Plaintiff  
5 must make two showings: "First, the plaintiff must make an 'objec-  
6 tive' showing that the deprivation was 'sufficiently serious' to  
7 form the basis for an Eighth Amendment violation. Second, the  
8 plaintiff must make a 'subjective' showing that the prison official  
9 acted 'with a sufficiently culpable state of mind.'" Johnson v.  
10 Lewis, 217 F.3d 726, 731 (9th Cir. 2000) [quoting Wilson v. Seiter,  
11 501 U.S. 294, 298 (1991)]. Finally, the Court must analyze each  
12 claimed violation in light of these requirements, for Eighth  
13 Amendment violations may not be based on the "totality of the  
14 conditions" at prison. Hoptowit, 682 F.2d at 1246-47; Wright v.  
15 Rushen, 642 F.2d 1129, 1132 (9th Cir. 1981).

16           Under the objective requirement, the prison official's acts  
17 or omissions must deprive an inmate of the "minimal civilized  
18 measure of life's necessities." Johnson, 217 F.3d at 731 (internal  
19 citations omitted). This objective component is satisfied so long  
20 as the institution "furnishes sentenced prisoners with adequate  
21 food, clothing, shelter, sanitation, medical care, and personal  
22 safety." Hoptowit, 682 F.2d at 1246; Farmer v. Brennan, 511 U.S.  
23 825, 832 (1970); Wright, 642 F.2d at 1132-33. Under the subjective  
24 standard, deliberate indifference requires a showing that the prison  
25 official "knows of and disregards an excessive risk to inmate health  
26 or safety; the official must both be aware of facts from which the  
27 inference could be drawn that a substantial risk of serious harm  
28 exists, and he must also draw the inference." Farmer, 511 U.S. at

1 837. A prison official is deliberately indifferent only if he knows  
2 that a prisoner faces a substantial risk of serious harm and  
3 disregards it by failing to take reasonable steps to abate it. Id.

4 1. Hernandez and Cate

5 Plaintiff's Complaint attempts to state a cause of action for  
6 cruel and unusual punishment against Hernandez and Cate for placing  
7 and retaining him in Ad Seg and transferring him to another prison.  
8 However, there are no allegations in Plaintiff's Complaint regarding  
9 Hernandez or Cate. Hernandez, as Director of the Department of  
10 Corrections, and Cate, as Secretary of the California Department of  
11 Corrections and Rehabilitation, can not be held liable for any of  
12 the acts of the other named Defendants because Plaintiff must plead  
13 that each official, through that official's own actions or set in  
14 motion a series of actions by others, violated the Eighth Amendment.  
15 Iqbal, 129 S.Ct. at 1948, Watkins, 145 F.3d at 1093. Since  
16 Plaintiff has failed to allege anything against Hernandez and Cate,  
17 the Court RECOMMENDS that Defendants' Motion to Dismiss in this  
18 regard be GRANTED without prejudice.

19 2. Cortez

20 Plaintiff's Complaint attempts to state a cause of action for  
21 cruel and unusual punishment for placing and retaining him in Ad Seg  
22 and transferring him to another prison. However, the only allega-  
23 tions in Plaintiff's Complaint pertaining to Cortez are that Cortez  
24 misrecorded minutes of the ICC to reflect that Plaintiff wanted to  
25 be transferred to another prison. Plaintiff alleges that he  
26 specifically told the ICC that he did not want to be transferred to  
27 another prison. This allegation, taken as true, does not support  
28 a cause for action for cruel and unusual punishment in violation of

1 the Eighth Amendment because it does not show that Plaintiff was  
2 deprived of the "minimal civilized measures of life's necessities,"  
3 or that Cortez knew and disregarded an excessive risk to Plaintiff's  
4 health and safety. Therefore, the Court RECOMMENDS that Defen-  
5 dants' Motion to Dismiss in this regard be GRANTED without preju-  
6 dice.

7 3. Marrero

8 Plaintiff's Complaint attempts to state a cause of action for  
9 cruel and unusual punishment for placing and retaining him in Ad Seg  
10 and transferring him to another prison. However, the only allega-  
11 tions in Plaintiff's Complaint pertaining to Marrero are that  
12 Marrero reviewed Plaintiff's placement in Ad Seg and refused to  
13 rescind that order pending an investigation of Plaintiff's alleged  
14 threat against a staff member, despite the conclusion of other staff  
15 members that Plaintiff did not threaten the staff member. Further,  
16 Plaintiff alleges that Marrero stated that the ongoing investigation  
17 into staff misconduct (which Plaintiff himself reported) precluded  
18 Plaintiff's return to the prison's general population because he  
19 could endanger the safety and security of the prison.

20 Here, Plaintiff's allegations regarding Marrero do not show  
21 that his placement and retention in Ad Seg was "sufficiently  
22 serious" to form the basis of an Eighth Amendment violation. Nor  
23 are Plaintiff's allegations regarding Marrero sufficient to show  
24 that Marrero deprived Plaintiff of the "minimal civilized measures  
25 of life's necessities." Johnson, 217 F.3d at 731. Further, Plain-  
26 tiff's allegations against Marrero are insufficient to show that  
27 Marrero acted "with a sufficiently culpable state of mind," or that  
28 Marrero "knew and disregarded an excessive risk to (Plaintiff's)

1 health or safety." Farmer, 511 U.S. at 837. Consequently, Plaintiff  
 2 has failed to plead the requirements necessary to allege against  
 3 Marrero a cause of action for cruel and unusual punishment in  
 4 violation of the Eighth Amendment.<sup>4/</sup> Therefore, the Court RECOMMENDS  
 5 that Defendants' Motion to Dismiss in this regard be GRANTED without  
 6 prejudice.

7 4. Smith

8 Plaintiff's Complaint attempts to state a cause of action for  
 9 cruel and unusual punishment for placing and retaining him in Ad Seg  
 10 and transferring him to another prison. However, the only allegation  
 11 in Plaintiff's Complaint pertaining to Smith is that Smith was in  
 12 the Program Office where Plaintiff gave a video and written  
 13 statement about the incident involving Aranda. This allegation,  
 14 taken as true, does not support a cause for action for cruel and  
 15 unusual punishment in violation of the Eighth Amendment because it  
 16 does not show that Plaintiff was deprived of the "minimal civilized  
 17 measures of life's necessities," or that Smith knew and disregarded  
 18 an excessive risk to Plaintiff's health and safety. Therefore, the  
 19 Court RECOMMENDS that Defendants' Motion to Dismiss in this regard  
 20 be GRANTED without prejudice.

21 5. Contreras

22 Plaintiff's Complaint attempts to state a cause of action for  
 23 cruel and unusual punishment for placing and retaining him in Ad Seg  
 24

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25 <sup>4/</sup> The Court acknowledges that Plaintiff alleges in his Opposition  
 26 that while he was in Ad Seg, he was "only allowed to go to the yard  
 27 once in the 123 days that (he) remained there." (Opposition at 5).  
 28 While this allegation may support Plaintiff's claim that his  
 retention in Ad Seg constituted cruel and unusual punishment and/or  
 deliberate indifference to Plaintiff's health, the Court may not  
 consider facts stated in Plaintiff's Opposition that were not  
 alleged in the Complaint. Schneider v. Cal. Department of  
Corrections, 151 F.3d 1194, 1197, n. 1 (9<sup>th</sup> Cir. 1998).

1 and transferring him to another prison. However, there are no  
2 allegations in Plaintiff's Complaint that pertain to Contreras,  
3 except that Contreras denied Plaintiff's appeal regarding the  
4 incident involving Aranda. The appeal response, signed by Contreras,  
5 is attached to Plaintiff's Complaint as Exh. A-8.

6 This allegation, taken as true, does not support a cause for  
7 action for cruel and unusual punishment in violation of the Eighth  
8 Amendment because it does not show that Plaintiff was deprived of  
9 the "minimal civilized measures of life's necessities," or that  
10 Contreras knew and disregarded an excessive risk to Plaintiff's  
11 health and safety.

12 Further, actions by prison officials with regard to prison  
13 grievance procedures can not create liability under § 1983. Ramirez  
14 v. Galaza, 334 F.3d 850, 860 (9<sup>th</sup> Cir. 2003). Moreover, on September  
15 24, 2007, Contreras *partially granted* Plaintiff's appeal, informed  
16 Plaintiff that the matter was referred to the Office of Internal  
17 Affairs and that Plaintiff would be notified of the conclusion of  
18 the Internal Affairs investigation. (Plaintiff's Complaint, Exh. A-  
19 8). Therefore, the Court RECOMMENDS that Defendants' Motion to  
20 Dismiss in this regard be GRANTED with prejudice.

21 V

22 PLAINTIFF FAILS TO STATE A CLAIM FOR RETALIATION FOR THE EXERCISE OF  
23 HIS FIRST AMENDMENT RIGHTS

24 Plaintiff alleges that Defendants retaliated against him for  
25 reporting the misconduct of Benven and Aranda. Plaintiff contends  
26 that the retaliation took the form of being placed and retained in  
27 Ad Seg and being transferred to another prison. Defendants  
28 Hernandez, Marrero, Contreras, Cortez and Smith contend that



1 Plaintiff's Complaint fails to state a claim for retaliation.

2 Prison officials may not retaliate against an inmate for  
3 exercising a constitutional right. Rizzo v. Dawson, 778 F.2d 527,  
4 532 (9<sup>th</sup> Cir. 1985). In Rhodes v. Robinson, 408 F.3d 559 (9th Cir.  
5 2005), the Ninth Circuit Court of Appeals established a standard for  
6 claiming retaliation under the First Amendment. Under this standard,  
7 a viable claim of First Amendment retaliation in the prison context  
8 is met if five elements are established: (1) an assertion that a  
9 state actor took some adverse action against an inmate; (2) because  
10 of; (3) that inmates's protected conduct, and that such action; (4)  
11 chilled the inmate's exercise of his First Amendment rights, and;  
12 (5) the action did not reasonably advance a legitimate correctional  
13 goal. Id. at 567-568. Legitimate correctional goals include  
14 preserving institutional order and discipline. See Barnett v.  
15 Centoni, 31 F.3d 813 (9th Cir. 1994).

16 Here, Plaintiff's Complaint fails to allege any of the  
17 elements of a cause of action for retaliation against Hernandez,  
18 Contreras, Cortez and Smith. Therefore, the Court finds that  
19 Plaintiff's Complaint fails to state a claim of retaliation against  
20 these Defendants.

21 The allegations against Marrero are that he placed and  
22 retained Plaintiff in Ad Seg pending an investigation that Plaintiff  
23 threatened a staff member, a decision of the ICC, and an ongoing  
24 inquiry about staff misconduct (about which Plaintiff himself  
25 complained). Plaintiff alleges that Marrero prevented him from  
26 returning to the prison due to the investigation into staff  
27 misconduct. However, these allegations do not satisfy at least two  
28 of the elements required to establish a viable claim for retalia-

1 tion. Plaintiff fails to allege facts to support element numbers  
2 four and five of a claim for retaliation - that Marrero's conduct  
3 chilled the exercise of his First Amendment rights and that  
4 Marrero's placing and retaining him in Ad Seg and stating that he  
5 could not return to the prison's general population, did not advance  
6 a legitimate correctional goal. Rhodes, 408 F.3d at 567-568.  
7 Therefore, the Court finds that Plaintiff's Complaint fails to state  
8 a cause of action for retaliation against Marrero.

9 As a result, the Court RECOMMENDS that Defendants' Motion to  
10 Dismiss in this regard be GRANTED without prejudice.

11 VI

12 PLAINTIFF FAILS TO STATE A CLAIM FOR VIOLATION OF DUE PROCESS

13 Plaintiff asserts that his right to due process was violated  
14 because he was unable to provide further information regarding: (1)  
15 his administrative appeal contentions that Benven's conduct be  
16 investigated, (2) Benven attempted to put his life in danger by  
17 revealing to Barno that he was the confidential informant, (3)  
18 Benven retaliated against him by spreading false rumors about him,  
19 (4) that Aranda's misconduct be investigated, (5) that Plaintiff be  
20 provided copies of all reports generated with respect to the  
21 incident involving Aranda, and (6) that Plaintiff be provided copies  
22 of all prior complaints against Aranda and Benven. Defendants  
23 contend that these allegations fail to state a claim for violation  
24 of due process.

25 "The requirements of procedural due process apply only to the  
26 deprivation of interests encompassed by the Fourteenth Amendment's  
27 protection of liberty and property." Board of Regents v. Roth, 408  
28 U.S. 564, 569 (1972). State statutes and prison regulations may

1 grant prisoners liberty interests sufficient to invoke due process  
2 protections. Meachum v. Fano, 427 U.S. 215, 223-27 (1976).  
3 However, the Supreme Court has significantly limited the instances  
4 in which due process can be invoked. In Sandin v. Conner, 515 U.S.  
5 472 (1995), the Supreme Court "refocused the test for determining  
6 the existence of a liberty interest away from the wording of prison  
7 regulations and toward an examination of the hardship caused by the  
8 prison's challenged action relative to the 'basic conditions' of  
9 life as a prisoner." Mitchell v. Dupnik, 75 F.3d 517, 522 (9th Cir.  
10 1996) (citing Sandin, 515 U.S. at 484).

11 The Supreme Court has specifically held that prisoners have  
12 no constitutionally protected liberty interest in remaining free of  
13 disciplinary segregation. Sandin, 515 U.S. at 485-486. Under  
14 Sandin, state-created liberty interests invoking procedural due  
15 process protection are "generally limited to freedom from restraint  
16 which, while not exceeding the sentence in such an unexpected manner  
17 as to give rise to protection by the Due Process Clause of its own  
18 force, nonetheless imposes atypical and significant hardship on the  
19 inmate in relation to the ordinary incidents of prison life." Id. at  
20 484 (citations omitted).

21 Pursuant to Sandin, Plaintiff must assert facts related to  
22 the conditions or consequences of his placement in Ad Seg which show  
23 "the type of atypical, significant deprivation [that] might  
24 conceivably create a liberty interest." Id. at 486. The Sandin  
25 Court relied on three factors to determine that the plaintiff  
26 therein did not possess a liberty interest in avoiding disciplinary  
27 segregation: (1) disciplinary and discretionary segregation were  
28 essentially the same; (2) comparison between conditions in the

1 general population and conditions in confinement showed that the  
2 plaintiff suffered no "major disruption in his environment"; and (3)  
3 the length of plaintiff's sentence was not extended. Id. at 486-87.

4 An inmate does not have a liberty interest in being housed at  
5 a particular institution or in avoiding isolation or separation from  
6 the general prison population unless the proposed transfer will  
7 subject the inmate to exceptionally more onerous living conditions,  
8 such as those experienced by inmates at a "Supermax" facility.  
9 Wilkinson v. Austin, 545 U.S. 209, 223 (2005) (holding that, despite  
10 the general rule that an interprison transfer does not implicate the  
11 Due Process Clause, a transfer to a so-called "Supermax" facility at  
12 which a prisoner would experience exceptionally more onerous  
13 conditions may implicate the Due Process Clause); Montayne v.  
14 Haymes, 427 U.S. 236, 242 (1976) (holding that a mere transfer from  
15 one facility to another does not implicate the Due Process Clause,  
16 regardless of whether the transfer is the result of the inmate's  
17 misbehavior or is punitive in nature if there is no State law to the  
18 contrary).

19 California law does not create a liberty interest in non-  
20 consensual prison transfers requiring procedural due process  
21 protection. CAL. PENAL CODE § 5080; CCR § 3379. Pursuant to Pratt v.  
22 Rowland, 65 F.3d 802, 806 (9th Cir. 1995), while prisoners generally  
23 have no constitutionally protected liberty interest in remaining in  
24 a given facility, if they allege retaliation, they may pursue that  
25 claim without having to establish "an independent constitutional  
26 interest." Id. However a retaliation claim is properly handled  
27 under the First Amendment analysis. Id. Therefore, while there is  
28 no liberty interest in remaining free from non-consensual prison

1 transfer sufficient to invoke the protection of the Fourteenth  
2 Amendment, Plaintiff may pursue his transfer claim as a retaliation  
3 claim under the First Amendment.

4 A prisoner can not premise a Fourteenth Amendment due process  
5 claim upon the denial of an appeal within the prison grievance  
6 system because a prisoner does not have a right to due process in  
7 administrative grievance procedures. Ramirez, 334 F.3d at 860. "The  
8 courts of appeal that have confronted the issue are in agreement  
9 that the existence of grievance procedures confers no liberty  
10 interest on a prisoner." Massey v. Helman, 259 F.3d 641, 657 (7<sup>th</sup>  
11 Cir. 2001).

12 Here, Plaintiff's claim for violation of his due process  
13 rights is lacking in several respects:

14 As previously noted, the requirements of due process apply  
15 only to the deprivation of interests encompassed by the Fourteenth  
16 Amendment's protection of liberty and property. Roth, 408 U.S. at  
17 569. A prisoner has no constitutionally protected liberty interest  
18 in remaining free from Ad Seg. Sandin, 515 U.S. at 485-486.  
19 Therefore, to the extent Plaintiff claims that his right to due  
20 process was violated by being placed and retained in Ad Seg, his  
21 claim fails.

22 To that end, documents attached to Plaintiff's Complaint  
23 indicate that on September 19, 2007, after Plaintiff's initial  
24 placement in Ad Seg, he actively participated in a hearing of the  
25 ICC regarding that placement. At the hearing, Plaintiff was  
26 informed that he was initially placed in Ad Seg after it was  
27 determined that he was a "suspect in a possible threat against a  
28 staff member." Plaintiff was additionally informed that the ICC

1 needed to clarify to Plaintiff that his placement and retention in  
2 Ad Seg was also due to an "ongoing inquiry about staff misconduct  
3 that he made." The ICC determined that Plaintiff would be retained  
4 in Ad Seg and it reaffirmed its recommendation that Plaintiff be  
5 transferred to another prison. Plaintiff indicated that he  
6 understood the ICC's decision. (Plaintiff's Complaint, Exh. B-10).  
7 Plaintiff's Complaint does not allege that the procedures employed  
8 or the hearing held regarding his placement and retention in Ad Seg,  
9 and the recommendation the he be transferred to another prison, were  
10 constitutionally inadequate. Accordingly, the Court finds that to  
11 the extent Plaintiff claims that his placement and retention in Ad  
12 Seg or the procedures employed with regard to that placement  
13 violated his due process rights, his claim fails.

14 The Constitution does not guarantee that an inmate will be  
15 placed or retained at a particular prison even when the degree of  
16 confinement at one prison might be different from another prison.  
17 Meachum, 427 U.S. at 224-225; Myron v. Terhune, 476 F.3d 716, 718  
18 (9<sup>th</sup> Cir. 2007). Therefore, to the extent Plaintiff claims that his  
19 due process rights were violated by being transferred to another  
20 prison, his claim fails.

21 As previously noted, a prisoner does not have the right to  
22 due process in administrative grievance procedures. Ramirez, 334  
23 F.3d at 860. Therefore, to the extent that Plaintiff claims his due  
24 process rights were violated by his inability to submit further  
25 information, his claim fails. Plaintiff's allegations regarding his  
26 administrative appeal contentions that Benvin's conduct be investi-  
27 gated, that Benvin attempted to put his life in danger by revealing  
28 to Barno that he was the confidential informant, that Benvin

1 retaliated against him by spreading false rumors about him, that  
 2 Aranda's conduct be investigated and that he be provided certain  
 3 documents created in connection with the incident involving Aranda,  
 4 are insufficient to state a valid claim for violation of due  
 5 process.

6 Accordingly, the Court RECOMMENDS Defendants' Motion to  
 7 Dismiss Plaintiff's due process claims be GRANTED without prejudice.

# VII

## 8 DEFENDANTS MARRERO, SMITH, CONTRERAS, CATE AND HERNANDEZ ARE 9 ENTITLED TO QUALIFIED IMMUNITY

10 Defendants Marrero, Smith, Contreras, Cate, and Hernandez  
 11 contend that they are entitled to qualified immunity.

12 The Eleventh Amendment prohibits damages actions against  
 13 state officials acting in their official capacities. See Will v.  
 14 Michigan Dept. of State Police, 491 U.S. 58, 71 n.10 (1989).  
 15 However, it does not "bar actions against state officers in their  
 16 official capacities if the plaintiffs seek only a declaratory  
 17 judgment or injunctive relief." Chaloux v. Killeen, 886 F.2d 247,  
 18 252 (9th Cir. 1989) (internal citations omitted). Nor does it bar  
 19 damage actions against state officials in their personal capacities.  
 20 See Hafer v. Melo, 502 U.S. 21, 31 (1991). The Eleventh Amendment  
 21 prohibits only damage actions against the "official's office;"  
 22 actions that are in reality suits against the state itself-rather  
 23 than against its individual officials. Id. at 26-27.

24 Here, Plaintiff clearly indicates his intent to sue the  
 25 above-named Defendants for damages in both their individual and  
 26 official capacities. (Complaint at 2-3). For this reason it is  
 27 RECOMMENDED that Defendants' Motion to Dismiss be GRANTED with  
 28

1 prejudice with respect to Plaintiff's claim for damages against  
2 Defendants in their official capacities.

3 1. Qualified Immunity

4 Marrerro, Smith, Contreras, Cate and Hernandez assert that  
5 they are protected from suits for civil damages due to the doctrine  
6 of qualified immunity because their conduct did not violate any  
7 clearly-established right under the circumstances in which they  
8 acted. These Defendants further claim that they are entitled to  
9 dismissal pursuant to FED.R.CIV.P. 12(b)(6) based on their qualified  
10 immunity. The entitlement to qualified immunity "is an immunity from  
11 suit rather than a mere defense to liability." Mitchell v. Forsyth,  
12 472 U.S. 511, 526 (1985). The defense of "qualified immunity"  
13 protects "government officials . . . from liability for civil  
14 damages insofar as their conduct does not violate clearly estab-  
15 lished statutory or constitutional rights of which a reasonable  
16 person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818  
17 (1982). This standard "'gives ample room for mistaken judgments' by  
18 protecting 'all but the plainly incompetent or those who knowingly  
19 violate the law.'" Hunter v. Bryant, 502 U.S. 224, 229 (1991) (per  
20 curiam) (quoting Malley v. Briggs, 475 U.S. 335, 343 (1986));  
21 Jeffers v. Gomez, 267 F.3d 895, 909-910 (9th Cir. 2001).<sup>5/</sup>

22 The Supreme Court recently held that the test for qualified  
23 immunity in Saucier v. Katz, 533 U.S. 194 (2001), is no longer a  
24 rigid two step analysis. Pearson v. Callahan, 192 S.Ct. 808 (2009)  
25 However, the Saucier analysis is still pertinent for qualified

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26  
27 <sup>5/</sup> The affirmative defense of qualified immunity does not extend to  
28 claims for declaratory or injunctive relief. Keenan v. Hall, 83  
F.3d 1083, 1093 (9th Cir. 1996) (citing American Fire, Theft &  
Collision Managers, Inc. v. Gillespie, 932 F.2d 816, 818 (9th Cir.  
1991). The Court takes notice that Plaintiff is also seeking  
injunctive and declaratory relief.



1 immunity purposes. Pearson, 192 S.Ct. at 818. Pursuant to Saucier,  
2 the first step in a qualified immunity analysis is, "taken in the  
3 light most favorable to the party asserting the injury, do the facts  
4 alleged show the officer's conduct violated a constitutional right?"  
5 Saucier, 533 U.S. at 201; Jackson v. City of Bremerton, 268 F.3d  
6 646, 650 (9th Cir. 2001); Johnson v. County of Los Angeles, 340 F.3d  
7 787, 791 (9th Cir. 2003) (noting that because qualified immunity is  
8 "'an entitlement not to stand trial' ... courts, not juries, [must]  
9 settle the ultimate questions of qualified immunity") (quoting  
10 Mitchell, 472 U.S. at 526). "If no constitutional right would have  
11 been violated were the allegations established, there is no  
12 necessity for further inquiries concerning qualified immunity."  
13 Saucier, 533 U.S. at 201; Haynie v. County of Los Angeles, 339 F.3d  
14 1071, 1078 (9th Cir. 2003). The second step of the qualified  
15 immunity analysis is whether "it would be clear to a reasonable  
16 officer that (Plaintiff's) conduct was unlawful in the situation he  
17 confronted." Saucier 533 U.S. at 202, Wilkins v. City of Oakland  
18 350 F.3d 949, 954 (9<sup>th</sup> Cir. 2003).

19 As previously noted in this Report and Recommendation,  
20 Plaintiff's Complaint failed to set forth sufficient allegations to  
21 support a claim of retaliation for the exercise of his First  
22 Amendment rights against Marrero, Smith, Contreras, Cate and  
23 Hernandez. (See Section V of this Report and Recommendation). As a  
24 result, Plaintiff does not satisfy the first prong of Saucier  
25 because the facts alleged in his Complaint do not show that  
26 Defendants' conduct violated a constitutional right. Saucier 533  
27  
28 U.S. at 201. Therefore, the Court RECOMMENDS that Defendants'

1 Motion to Dismiss in this regard be GRANTED without prejudice.

2 VIII

3 CONCLUSION AND RECOMMENDATION

4 For the reasons set forth herein, the Court RECOMMENDS as  
5 follows:

6 (1) The Court RECOMMENDS Defendants' Motion to Dismiss  
7 Plaintiff's Eighth Amendment cruel and unusual punishment and  
8 deliberate indifference claims be GRANTED without prejudice.

9 (2) The Court RECOMMENDS that Defendants' Motion to Dismiss  
10 Plaintiff's claim for Retaliation for Exercise of his First  
11 Amendment rights be GRANTED without prejudice.

12 (3) The Court RECOMMENDS Defendants' Motion to Dismiss  
13 Plaintiff's Due Process claims be GRANTED without prejudice.

14 (4) The Court RECOMMENDS Defendants' Motion to Dismiss with  
15 regard to Plaintiff's claim for damages against Defendants in their  
16 official capacities be GRANTED with prejudice.

17 (5) The Court RECOMMENDS that Plaintiff's claim for damages  
18 against Defendants in their individual capacities be GRANTED without  
19 prejudice.

20 (6) The Court RECOMMENDS that Plaintiff be given a reasonable  
21 amount of time to amend his Complaint.

22 This report and recommendation of the undersigned Magistrate  
23 Judge is submitted to the United States District Judge assigned to  
24 this case, pursuant to the provision of 28 U.S.C. § 636(b)(1).

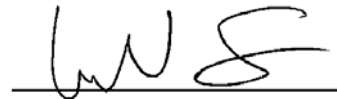
25 **IT IS ORDERED** that no later than June 1, 2010, any party to  
26 this action may file written objections with the Court and

27  
28 serve a copy on all parties. The document should be captioned

1 "Objections to Report and Recommendation."

2 **IT IS FURTHER ORDERED** that any reply to the objections  
3 shall be filed with the Court and served on all parties no later  
4 than June 14, 2010. The parties are advised that failure to file  
5 objections within the specified time may waive the right to raise  
6 those objections on appeal of the Court's order. Martinez v. Ylst,  
7 951 F.2d 1153 (9th Cir. 1991).

8  
9 DATED: May 3, 2010

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12 Hon. William V. Gallo  
13 U.S. Magistrate Judge  
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